MOTION FILED
FEB 10 1993

No. 92-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE EXPLORERS CLUB AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel
BARBARA HOFFMAN
SCHWARTZ, WEISS,
STECKLER & HOFFMAN
521 Fifth Avenue
New York, NY 10175
(212) 687-5725

RICHARD A. CORDRAY
(Counsel of Record)
JONES, DAY, REAVIS
& POGUE
1900 Huntington Center
Columbus, Ohio 43215
(614 469-3939

Counsel for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE EXPLORERS CLUB IN SUPPORT OF THE PETITION

The Explorers Club hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondents has refused consent.

The Explorers Club is an international professional society of explorers and field scientists committed to the ideal that it is vital to preserve the instinct to explore. The Club comprises several thousand men and women who are leading explorers and field

scientists in a wide variety of disciplines, many of them well known throughout the world. Noted members have included Sir Edmund Hillary, Roy Chapman Andrews, Thor Heyerdahl, Lowell Thomas, Robert Peary, and Richard Leakey, among others.

The Explorers Club seeks to advance its ideal by encouraging scientific exploration and discovery in a wide range of disciplines, by maintaining a repository of rare and unusual scientific data and materials, and by conducting research and educational activities in the public interest. The Club also acts as an endorsing or sponsoring institution for a limited number of expeditions. Through these activities, the Club aims to serve as a stimulus to the enduring spirit of exploration in human nature. The ruling below deals a heavy blow to those efforts in the context of scientific exploration on the deep ocean floor.

The Explorers Club constantly experiences the many difficulties that attend the vital human pursuit of scientific exploration and discovery, which include financial and regulatory roadblocks as well as physical dangers and natural obstacles. The issue of when artifacts and other items are considered to be "abandoned," rather than "owned" in the abstract by paper claimants, is an important legal issue worldwide. It is particularly critical in providing the necessary incentives for the emerging technology of deep-sea exploration and research. The decision in this case may well determine whether items lodged on the ocean floor can be made readily accessible to those who are willing and able to surmount the innumerable obstacles to locating and recovering them. It inevitably will have a profound effect on marine archaeology and underwater scientific exploration.

The Explorers Club thus brings a unique perspective to this case. Its historical experience includes participation in many of the most significant missions of scientific exploration undertaken in this century. The practical effects of the ruling below on those who would undertake such missions are substantial and the

attached brief seeks to illustrate them. The Explorers Club's international vantage point also allows the consideration of additional points discussed in the attached brief that may not be presented by the principal parties.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the Petition.

Respectfully submitted,

Of Counsel
BARBARA HOFFMAN
SCHWARTZ, WEISS,
STECKLER & HOFFMAN
521 Fifth Avenue
New York, NY 10175
(212) 687-5725

RICHARD A. CORDRAY
(Counsel of Record)
JONES, DAY, REAVIS
& POGUE
1900 Huntington Center
Columbus, Ohio 43215
(614 469-3939

Counsel for Amicus Curiae

February 16, 1993

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE i

TABLE OF AUTHORITIES vii

STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

QUESTION PRESENTED 3

REASONS FOR GRANTING THE WRIT 3

I. THE ISSUE RAISED HERE HAS INTERNATIONAL RAMIFICATIONS FOR ENCOURAGING SCIENTIFIC INQUIRY AND EXPLORATION 4

A. The Rights Of Discoverers And Explorers Are Of Broad And Enduring Importance, Especially When Exploring Uncharted Mysteries Like Those Of The Ocean Depths 4

B. The Ruling Below Will Deter And Hamper Scientific Inquiry By Multiplying The Already Grave Difficulties In Organizing And Promoting Missions Of Exploration 7

II. THE RULING BELOW IS INCORRECT AND WILL AGGRAVATE PROBLEMS OF FORUM-SHOPPING IN AMERICAN COURTS AND WORLDWIDE 9

A. The Ruling Below Conflicts With Many Decisions And Misapplies The Legal Rules Governing Lost Shipwrecks 9

TABLE OF CONTENTS (Continued)

PAGE

B. The Ruling Below Creates Conflicts Not Only Among American Courts, But Also Among Courts Worldwide 11

III. THE RULING BELOW CREATES THESE NEW AND RECURRING PROBLEMS AT A TIME WHEN ADVANCES IN TECHNOLOGY ARE OPENING IMPORTANT AND EXCITING NEW MYSTERIES TO THE POSSIBILITIES OF HUMAN INQUIRY . . 13

A. This Issue Is Recurring With Increased Frequency Because Of Recent Significant Technological Advances 13

B. This Court Is Sensitive To The Importance Of Preventing American Law From Lagging Behind Improved Technologies 14

C. This Court's Sensitivity To Changing Technologies Is Especially Critical In The Realm Of Admiralty Law 15

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907) 17
Chance v. Certain Artifacts Found and Salvaged, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985) 9
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 15
Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) 15
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 16
Florida v. Riley, 488 U.S. 445 (1989) 15
Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) . . 16
Katz v. United States, 389 U.S. 347 (1967) 14
Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985) 9
MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) 17
Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) 9
Maryland v. Craig, 497 U.S. 836 (1990) 15
Pierce v. Bemis, [1986] 2 W.L.R. 501 (Q.B. 1985) . . . 12, 13
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) . 14
Rock v. Arkansas, 483 U.S. 44 (1987) 15
Roe v. Wade, 410 U.S. 113 (1973) 15
Smith v. New England Aircraft Co., 170 N.E. 385 (Mass. 1930) 17
Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) 15
Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) 8,9

TABLE OF AUTHORITIES (Continued)

PAGE

Trevor v. Wood, 36 N.Y. 307 (1867) 17
United States v. Steinmetz 973 F.2d 212 (3rd Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859) 14
Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960) 8
Wyman v. Hurlburt, 12 Ohio St. 81 (1843) 9
Zych v. The Unidentified, Wrecked and Abandoned Vessel, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992) 14

Constitutional Provisions

U.S. Const., art. I, § 8 4
U.S. Const., art. III, § 3 15

Statutes and Legislative Material

28 U.S.C. § 1333 10
33 U.S.C. § 1101 7
Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 10
H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365 10

Rules and Regulations

Fed. R. Civ. P. 30(b) 17
Fed. R. Civ. P. 5(e) 17
Fed. R. Evid. 1003 17

TABLE OF AUTHORITIES (Continued)

PAGE

Miscellaneous

Robert P. Ballard, *The Lost Wreck of the Isis* (1990) 6
Daniel Boorstin, *Discoverers and Inventors*, in *Inventors and Discoverers: Changing Our World* 6 (1988) 4
William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993 6
George Fichter, *The Future Sea* (1978) 6
William H. Goetzmann, *New Lands, New Men* (1986) 5
Lloyd Mallon, *Secrets of the Sea* (1965) 6
Timothy Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992 8
Paulsen & Burrick, *Forum Non Conveniens in Admiralty*, 13 J. Mar. L. & Com. 343 (1982) 12
Thomas Schoenbaum, *Admiralty and Maritime Law* (1987) 9, 10, 11, 17
Sunken Treasure!, Reader's Digest, Dec. 1990 8
Richard A. Van Orman, *The Explorers* (1984) 5
Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) 17
William Wertenbaker, *Mysteries of the Deep* (1980) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1189

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE EXPLORERS CLUB AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Explorers Club is a multidisciplinary, professional society dedicated to the advancement of field research, scientific exploration, and resource conservation of land, sea, air, and space with emphasis in the physical and natural sciences, and the ideal that it is vital to preserve the instinct to explore. As the "World Center for Exploration," the Club serves as a common bond and meeting point for explorers and field scientists worldwide. Founded at the turn of the century, the Club is now an international organization of several thousand men and women, many of them world-famous in their own right. Past Presidents and Honorary Presidents of the Club have included Admiral

Robert E. Peary, who discovered the North Pole; Roy Chapman Andrews, who led expeditions to the Gobi Desert that discovered the first fossilized dinosaur eggs; and Sir Edmund Hillary, who after repeated efforts became the first known person to scale Mount Everest in 1953.

The Club was originally established "to encourage explorers in their work by evincing interest and sympathy, and especially by bringing them in personal contact and binding them in the bonds of good fellowship." The Club pursues this aim by encouraging scientific exploration and discovery in a wide range of disciplines; by maintaining an important body of books, charts, and maps as well as an archive of other unique reference materials such as log books, diaries, correspondence, photographs, and artifacts from the collections of many famous explorers; and by conducting research and educational activities in the public interest. Thus, the Club acts as a reservoir of the instinct to explore and as a stimulus to the enduring "spirit of exploration" in human nature.

The Club also acts as an endorsing or sponsoring institution for a limited number of expeditions each year. The Explorers Club Flag represents an impressive history of courage and accomplishment, and it is considered a signal honor and privilege to carry the Flag on an expedition. The Flag has flown at both poles, at the highest mountain peaks, and in the most remote jungles and deserts; it has traveled to the depths of the ocean and to outer space. The Explorers Medal is bestowed as the Club's highest honor upon those judged to have made extraordinary contributions in the field of exploration, scientific research, or the welfare of humanity. A few of those who have carried the Flag or received the Medal are Admiral Richard E. Byrd for his Arctic and Antarctic flights and expeditions; Charles Lindbergh on his transatlantic solo flight; Thor Heyerdahl in his several recreations of primitive voyages; Richard E. Leakey for his African excavations; Dr. Robert Ballard for the discovery of the TITANIC; and numerous astronauts on their missions into space.

The Explorers Club is intimately aware of the myriad difficulties that are often encountered in the vital human pursuit of scientific exploration and discovery. These take many forms, including financial and regulatory roadblocks as well as physical dangers and natural obstacles. The issue of when artifacts and other items are considered to be "abandoned," rather than "owned" in the abstract by paper claimants, is an important legal issue worldwide. It may well determine whether those items are readily accessible to those with the ingenuity and persistence to overcome the dangers and difficulties of locating and recovering them. And in many cases, that initial determination will preordain the result of efforts to assemble the many pieces that are needed to put in motion a successful scientific expedition.

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

REASONS FOR GRANTING THE WRIT

In concluding that shipwrecks and their contents cannot be abandoned even after the passage of centuries, a divided panel of the Fourth Circuit has decided an important and increasingly recurrent question of federal admiralty law in conflict with the decisions of federal, state, and international courts. The unfortunate result of that ruling, if it is allowed to stand, will also be to impede exploration efforts significantly.

I. THE ISSUE RAISED HERE HAS INTERNATIONAL RAMIFICATIONS FOR ENCOURAGING SCIENTIFIC INQUIRY AND EXPLORATION

A. The Rights Of Discoverers And Explorers Are Of Broad And Enduring Importance, Especially When Exploring Uncharted Mysteries Like Those Of The Ocean Depths.

The importance of exploration to the advancement of human civilization is immeasurable. Since the beginning of human history, exploration, discovery, and the freedom and incentive to inquire into the unknown have enriched the lives of all humanity. Daniel Boorstin, *Discoverers and Inventors*, in *Inventors and Discoverers: Changing Our World* 6, 7 (1988). Along with discovery comes invention, as new needs must be supplied to meet unanticipated situations where individuals are matching wits with the physical and natural barriers that resist their most intrepid efforts. The role of the law in protecting discoverers and their finds "against unknown savages and unfriendly rivals" was recognized by the Framers of the Constitution, who "prophetically glimpsed the partnership" that would be formed between discovery and invention. *Id.* at 8.

In the Constitution itself, this recognition is most explicit in Article I, Section 8, which grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* But it also manifests itself in many areas of American statutory and common law, which have secured to "a single community of questing mankind" the opportunity to benefit everyone by pursuing their own natural curiosity. Boorstin, *supra*, at 10.

This widespread appreciation for the fruits of broad inquiry is best explained against the backdrop of American history. Exploration has been crucial to scientific advancement, American

expansion, and economic entrepreneurship. The American continent itself was literally discovered by daring voyagers like Christopher Columbus, Cabeza de Vaca, and Hernando de Soto, who were lured to risk their lives in pursuit of discovery and financial gain.[1] In the century following the American founding, the flora, fauna, and geography of the continent were revealed by entrepreneurial individuals like Meriwether Lewis, William Clark, Zebulon Pike, and John Charles Fremont. During that time, explorers "had a profound impact upon American and western culture -- upon science, philosophy, and art, and also upon the popular imagination." William H. Goetzmann, *New Lands, New Men* 15 (1986).

Explorations throughout American history often had both scientific and economic goals. President Jefferson instructed Lewis and Clark to note trading opportunities and mineral deposits during their western journeys, and they did so even as they also documented the geography and climate of the new regions and described 120 animals and 175 plants that were previously unknown. Richard A. Van Orman, *The Explorers* 171 (1984). Many expeditions were not sponsored directly by the Government, but had to forge ahead on the vision and daring of their leaders and the capital they could manage to scrape together from a few willing backers who might harbor some hope of economic gain.

After 1890, when the United States Census Bureau declared the frontier to be officially closed, the enduring spirit of exploration was channeled into other directions. Some selflessly braved the arctic regions, such as Admiral Robert E. Peary (a former President of the Explorers Club), who was the first to reach the North Pole. Others eventually made their way into

---

[1] The persistence of Columbus, whose attempts to gain financial backing at the courts of European monarchs were repeatedly rebuffed, is familiar to many American schoolchildren.

outer space, such as Scott Carpenter, who became the second American to orbit the Earth.[2]

Still others turned to explore the mysteries of the ocean depths. Interestingly enough, oceanography, "sometimes called the science of 'inner space,' much resembles astronautics, or the science of outer space." Lloyd Mallon, *Secrets of the Sea* 37 (1965). Since World War II, in particular, dramatic technological developments have opened a new age of exploration in the oceans. Increasingly sophisticated devices such as remotely operated vehicles now descend to depths of more than 20,000 feet. Equipped with cameras, mechanical arms, and sonar systems, these vehicles can provide a comprehensive view of the ocean depths for controllers on the surface, a technique known as "telepresence." *See* William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B5.

The pattern of exploration and discovery advancing science and human progress has continued in this emerging field. The recovery of long-lost artifacts from underwater shipwrecks has become a somewhat more realistic endeavor in the last decade. Estimates are that more than a million ships have been lost to the seas during recorded history, with their potential contents currently valued at more than $300 billion. George Fichter, *The Future Sea* 55 (1978). At the same time, telecommunications have allowed millions to participate in discovery, as has occurred with Dr. Robert Ballard's discovery and exploration of the TITANIC and also of long-lost Mediterranean shipwrecks. Robert P. Ballard, *The Lost Wreck of the Isis* 12-13 (1990).[3]

---

[2] Carpenter, who is an Honorary Director of the Explorers Club, went on from his 1962 space mission to engage in aquatic exploration. In 1965, Carpenter spent thirty days on the floor of the Pacific Ocean as part of the Sealab II crew, which probed the potential limitations of human existence below the surface of the seas.

[3] Dr. Ballard is also an Honorary Director of the Explorers Club.

Yet, the exploration of sunken shipwrecks, a multidisciplinary activity that brings together an array of natural and social sciences, remains extremely delicate and complex. *See generally* William Wertenbaker, *Mysteries of the Deep* 295-96 (1980).

Congress has explicitly recognized that these kinds of explorations are worthy of national acclaim and encouragement. It has declared a national policy "to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind." 33 U.S.C. § 1101(a). The objectives of that policy include "encouragement of private investment enterprise in exploration, technological development, . . . and economic utilization of the resources of the marine environment," the "expansion of human knowledge of the marine environment," and cooperation "with other nations . . . in marine science activities." *Id.* § (b)(2), (3) and (8). As noted above, American law more generally reflects many of the same kinds of policies.

B. The Ruling Below Will Deter And Hamper Scientific Inquiry By Multiplying The Already Grave Difficulties In Organizing And Promoting Missions Of Exploration.

Missions of scientific exploration often are extremely difficult to initiate and organize. Indeed, except for their eventual success, the discoveries made by Petitioner from the shipwreck of the S.S. CENTRAL AMERICA follow the classic, age-old pattern of many exploration missions, and especially of modern scientific missions. Great amounts of human and investment capital were needed even to locate this particular shipwreck, and at least one mistaken identification occurred, with a consequent diversion of energies. Many people were involved in the project, and additional technologies had to be adapted to allow any realistic prospect of success. Once the site was located, prolonged operations were needed both to secure items from the wrecked vessel and to preserve them in a form allowing subsequent

scientific analysis and explanation. All told, the work done on this project took thirteen years, and the original dream was only achieved after countless harrowing brushes with possible ruin. *See generally* Timothy Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992; *Sunken Treasure!*, Reader's Digest, Dec. 1990.

One of the major incentives for the project was provided by a doctrine of federal admiralty law, which applies the "law of finds" to long-lost shipwrecks, awarding title in the abandoned contents to anyone who manages to retrieve them. *See, e.g., Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). Yet the ruling below refused to apply the law of finds to this shipwreck, which occurred more than 130 years ago in the depths of international waters. That ruling thus knocks out the underpinnings of the single major impetus for would-be discoverers and their potential backers to undertake the massive costs and risks of these underseas recovery missions. There is no question that the ruling below, if allowed to stand, will greatly discourage further efforts to explore the ocean depths. For those who do explore and discover submerged vessels, secrecy and outright looting will be encouraged by the hostility of this precedent to the character of the legal rights that may be conferred by such activity.

By restricting a discoverer to no recovery other than an uncertain salvage award set after the fact in a court proceeding, the ruling below undercuts the national commitment to exploration and technological development of the ocean floor that Congress had ostensibly established. The "Progress of Science" thus envisioned in the Constitution is inevitably slowed. The traditional admiralty doctrine that historically has rewarded and encouraged the active and the deserving is abruptly cast aside. Instead, that ruling bizarrely favors the putative successors of indolent claimants who went to their deaths many years before

without ever undertaking to recover what now is judged to be once again theirs! Thus would the creative spirit be fettered unjustly by an unwarranted application of peculiar and even harmful legal abstractions.

II. THE RULING BELOW IS INCORRECT AND WILL AGGRAVATE PROBLEMS OF FORUM-SHOPPING IN AMERICAN COURTS AND WORLDWIDE

A. The Ruling Below Conflicts With Many Decisions And Misapplies The Legal Rules Governing Lost Shipwrecks.

The ruling below conflicts with most of the decisions in this area. As a leading authority on admiralty law states the issue: "In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage, is appropriate because 'disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.'" Thomas Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987) (quoting *Treasure Salvors*, 569 F.2d at 337).

In addition to the cases cited previously, the ruling below stands in conflict with *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), with *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987), and with *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985). Among the rare older cases, it also conflicts directly with *Wyman v. Hurlburt*, 12 Ohio St. 81 (1843). The existence of conflicting decisions on this issue is particularly problematic since the issue is one of admiralty law, where uniformity is necessary to discourage the extensive forum-shopping that is otherwise

permitted by the liberal venue provisions of 28 U.S.C. § 1333. *See* Schoenbaum, *Admiralty and Maritime Law* § 20-10.[4]

The court below suggested that conflicting cases can be reconciled by considering whether claimants had stepped forward to assert ownership rights in the items recovered from a wrecked vessel. Pet. 21a-27a. The suggestion is incorrect. Not only are the cases unreconciled, but the court simply ignores the clear *rationale* that is put forward in numerous decisions for applying the law of finds to shipwrecked vessels -- that a prolonged lapse of time, spanning decades or even centuries, renders ordinary notions of "ownership" obsolete. This rationale is grounded not only in plain common sense, but also in the practical reality that a lapse of time spanning generations makes any attempt to prove alleged claims of "ownership" an obvious farce. At the common law, indeed, the accepted notion of "ownership," which includes possession, control, and use, allows even a clearly lawful title in fixed land to become forfeit when these indicia are not present for a defined period, as under the doctrine of adverse possession.

In addition, the ruling below misunderstands the kinds of incentives that are conferred by the law of finds as opposed to the law of commercial salvage. When boats and other watercraft are

---

[4] The decision below is also at odds with the Abandoned Shipwreck Act of 1987, which was enacted by the Congress to balance the interests of the Federal Government and the States in submerged vessels located in the territorial waters off the coasts. 43 U.S.C. §§ 2101-2106. The operation of the Act turns on the definition of the term "abandoned," which appears to prefer application of the law of finds rather than the law of commercial salvage. Although the term is not defined in the Act itself, the Committee report states that "abandonment or relinquishment of ownership rights may be implied or otherwise inferred," and "does not require the original owner to actively disclaim title or ownership." H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366. The ruling below is in square conflict with these statements.

capsized or sunk, the law of commercial salvage generally is applied to enforce some reward for those able to aid in recovering the dispossessed cargo. The site of the mishap is almost always fixed, and the owners of the property, whose posssession and control of it have been disturbed only temporarily, are typically aware of and involved in salvage efforts. In such circumstances, there is little danger of clandestine activity or looting, and the law of commercial salvage encourages useful contributions by those who otherwise lack any incentive to help. *See, e.g.*, Schoenbaum, *Admiralty and Maritime Law* § 15-7. But these circumstances are quite distinct from the case of an ancient lost shipwreck, where any salvage efforts on behalf of the original property owners have long since been abandoned. Here even the whereabouts of the wreckage often are not known with any precision, and generations may have passed since the erstwhile owners of the property had asserted any remaining interest in it. In this very different situation, the more restrictive law of commercial salvage would undercut the strong incentives needed to stimulate any new salvage efforts. Moreover, application of the law of commercial salvage would encourage secretive activity and disorganized looting by limiting any legal recovery to considerably less than might be garnered simply by quietly taking possession and control of any sunken treasure that may be found. *Id.* The ruling below thus disserves the interests of scientific exploration, historic preservation, and legal order.

B. The Ruling Below Creates Conflicts Not Only Among American Courts, But Also Among Courts Worldwide.

The conflict in decisions among the lower courts is especially important "because of the generous venue of admiralty and the worldwide character of the shipping and offshore industries." Schoenbaum, *Admiralty and Maritime Law* § 20-11. The nature of maritime law is such that an inordinate number of cases are brought in American courts, with its liberal procedures and pleading requirements, which leads to a vigorous application of the *forum non conveniens* doctrine to protect defending parties.

See, e.g., Paulsen & Burrick, *Forum Non Conveniens in Admiralty*, 13 J. Mar. L. & Com. 343 (1982). Thus, a confusion in decisions among the lower courts, which will lead directly to massive forum shopping within this country, will have a similar effect worldwide.

Even more important, the ruling below creates a conflict in decisions that extends beyond the American courts. The controlling British decision on this issue holds that the contents of a shipwreck can be presumed from the facts of the case to be abandoned after a sufficient lapse of time. *Pierce v. Bemis*, [1986] 2 W.L.R. 501 (Q.B. 1985). The case involved the wreck of the LUSITANIA. The ship had been torpedoed and sunk in 1915, which proved to be one of the major provocations that brought the United States into the First World War. In 1982, it was located and salvaged in international waters. Suit was brought to determine who had ownership rights in the vessel's contents. The English Admiralty Court held that the contents belonged to those who had salvaged them. On this point, the Court held: "So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property." *Id.* In addition, the Court concluded that the Crown did not possess any sovereign rights over shipwrecked vessels that were located in international waters.

The ruling below stands in flat opposition to this decision of the British courts. Here, too, the S.S. CENTRAL AMERICA was identified and salvaged in international waters. The court below held as a matter of law that the contents could not be judged to be abandoned, even after more than a century had passed with no attempt made by the owners to salve them. That ruling is absurd, and its pernicious effects extend well beyond our national borders, driven by the broad and fluid reach of the federal admiralty jurisdiction. A conflict in decisions between the United States and Great Britain is particularly unfortunate, as

these two nations are leaders in maritime commerce and both aggressively enforce their admiralty jurisdiction over activities on the high seas. This Court should accept review to correct the problems caused by this anomalous ruling.

III. THE RULING BELOW CREATES THESE NEW AND RECURRING PROBLEMS AT A TIME WHEN ADVANCES IN TECHNOLOGY ARE OPENING IMPORTANT AND EXCITING NEW MYSTERIES TO THE POSSIBILITIES OF HUMAN INQUIRY

A. This Issue Is Recurring With Increased Frequency Because Of Recent Significant Technological Advances.

The legal issues raised by the identification and potential recovery of "abandoned" shipwrecks have been cropping up with much greater frequency over the past decade than ever before. These recent developments reflect dramatic breakthroughs that have occurred in underwater technologies. As the English Admiralty Court noted in its consideration of the abandoned wreck of the LUSITANIA: "In the last century the question was unlikely to arise when a ship sank in deep water because diving techniques had not been developed which enabled anyone to recover the ship or her contents." *Pierce v. Bemis,* 2 W.L.R. 501. For example, the development of remotely operated vehicles that can see and retrieve items from the deep ocean has been a phenomenon of the last quarter-century.

A comprehensive search of electronic legal databases shows that only a handful of cases involving shipwrecked vessels were decided before 1950. *See* Appendix (listing cases). None of those cases, moreover, involved the delicate and extraordinarily complex deep-sea recovery techniques that were applied in this case, which raise novel and difficult issues. Since 1950, the trickle of reported decisions stemming from disputes about shipwrecked vessels has become a steady stream. Dozens of such

cases have been reported in the last decade, *see id.*, and this is the third such case to come before this Court in the past year. *See also Zych v. The Unidentified, Wrecked and Abandoned Vessel*, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992); *United States v. Steinmetz* 973 F.2d 212 (3rd Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859).

These cases are recurring with increased frequency because of the new technologies that have made the deep sea floor accessible to scientific exploration for the first time. This advance in underwater recovery technology has been encouraged -- indeed, has only been made possible -- by the favorable climate of legal doctrine, with courts generally applying the law of finds to long-lost shipwrecks rather than the more restrictive law of commercial salvage. *See* Part IB, *supra*. The incentives thus conferred upon human activity and creativity have borne fruit in an explosion of new methods and devices whose invention and application have been spurred by the promise fostered by this favorable legal regime. Yet the ruling below, which stands in opposition to these marked trends, would substantially jeopardize the fruits of that new promise.

B. This Court Is Sensitive To The Importance Of Preventing American Law From Lagging Behind Improved Technologies.

This Court has shown a keen awareness of the need to keep American law current with the swift pace of modern technology. In countless cases, this Court has considered or revisited legal issues when their application has been affected by technological changes in society. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (applying First Amendment in the context of radio broadcasting); *Katz v. United States*, 389 U.S. 347 (1967) (applying Fourth Amendment to electronic eavesdropping devices).

The Court's vigilance has been especially acute in areas where its decisions map out most of the governing law for this Nation. This is true most notably in constitutional law, though the same principles apply also to other areas of federal law, such as the federal admiralty law.

In recent years, the Court has taken review in legions of cases raising questions spurred by the pervasive impact of modern technology. As certainly the most prominent example, the Court has grappled at regular intervals with the implications of Justice O'Connor's observation in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-58 (1983) (O'Connor, J., concurring), that advances in medical technology have blurred the foundations of the trimester framework advanced in *Roe v. Wade*, 410 U.S. 113 (1973). To list just a few other examples from the past several Terms, the Court has considered whether the Sixth Amendment allows closed-circuit transmission of witness testimony to the defendant, *Maryland v. Craig*, 497 U.S. 836 (1990); how modern medical support mechanisms prolonging life may affect the right to privacy, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); whether helicopter observations of private property violate the Fourth Amendment, *Florida v. Riley*, 488 U.S. 445 (1989); and whether hypnotically refreshed testimony can be excluded under the Fifth and Sixth Amendments, *Rock v. Arkansas*, 483 U.S. 44 (1987).

C. This Court's Sensitivity To Changing Technologies Is Especially Critical In The Realm Of Admiralty Law.

This Court's evaluation of the impact of technology on legal doctrine is especially appropriate within the realm of admiralty law, where the Court has "large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959); U.S. Const., art. III, § 3 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). This Court has been charged since the Founding of our Nation with primary authority

to develop a federal common law of admiralty, subject to occasional intervention by Congress. Thus the Court itself sets many of the incentives for human progress in the fields of endeavor touched by admiralty law.

The Court has recognized the significance of these concerns in granting review of previous admiralty cases. For example, in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Court granted review of a case involving an airplane crash. The Court took the case to clarify an increasingly important legal issue that had created conflict among the lower courts: whether the circumstances of modern aviation required a reformulation of the traditional locality test for determining admiralty jurisdiction over maritime torts. *Id.* at 252-61. In that case, the Court reaffirmed application of the traditional jurisdictional rules.

In like manner, the Court granted review of another such issue in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). The question raised was whether the collision of two pleasure boats, neither of which was engaged at all in maritime commerce, brought the ensuing dispute within the federal admiralty jurisdiction. Justice Powell noted that the issue raised was novel, for "[p]leasure boating is basically a new phenomenon, the product of a [new] technology." *Id.* at 680-81 (Powell, J., dissenting) (quotation omitted). The Court judged this new issue to be important enough to resolve the confusion that it found among the lower courts, *id.* at 669, and ultimately held that its historic doctrines must be modified to address this new situation.

Indeed, the Court's proper role in the realm of admiralty law is analogous to the central role played by the state courts of last

resort in interpreting and adapting the common law.[5] There the common-law courts have been quite cognizant of the need to reconsider legal doctrines as their practical application is altered or even transformed by the rapid march of science. Examples of this intensive focus in the common law abound in property law, *see, e.g.*, *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930) (property rights of landowners modified to allow aerial navigation); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907) (describing special law of capture developed for migratory subterranean natural resources, such as oil and gas); in tort law, *see, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (announcing unprecedented ground of tort liability for automobile manufacturers to injured customers); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (contending that an invasion of privacy tort is justified based on legal responses to new technological intrusions into private life); and in contract law, *see, e.g.*, *Trevor v. Wood*, 36 N.Y. 307 (1867) (adapting mailbox rule for contract offers where transmission is by telegraph). Abundant examples exist also in the judicial rules that have been devised to modernize procedural law. *See, e.g.*, Fed. R. Civ. P. 30(b)(4) and (7) (allowing depositions to be videotaped or taken by telephone); *id.* 5(e) (allowing papers to be filed with the court by facsimile transmission); Fed. R. Evid. 1003 (allowing duplicate copies to be admitted to the same extent as originals under the "best evidence" rule).

These are but a few of the many instances in which advancing technologies have created important new legal questions that demanded a review of existing practices. The issue raised here

---

[5] "The federal judiciary both constitutionally and traditionally plays a much greater role in the development of maritime law than in the development of non-maritime common law. State law plays a diminished and secondary role." Schoenbaum, *Admiralty and Maritime Law* § 15-7.

is of the same character and is taking on an expanding significance. Certiorari should be granted.

CONCLUSION

For these reasons, as well as those stated in the Petition, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Of Counsel
BARBARA HOFFMAN
SCHWARTZ, WEISS,
STECKLER & HOFFMAN
521 Fifth Avenue
New York, NY 10175
(212) 687-5725

RICHARD A. CORDRAY
(Counsel of Record)
JONES, DAY, REAVIS
& POGUE
1900 Huntington Center
Columbus, Ohio 43215
(614 469-3939

Counsel for Amicus Curiae

February 16, 1993

APPENDIX

JUDICIAL DECISIONS INVOLVING SHIPWRECKS, IDENTIFIED IN FEDERAL AND STATE ELECTRONIC DATABASES (WESTLAW AND LEXIS)

Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992), *rev'g* 742 F. Supp. 1327 (E.D. Va. 1990)

Deep Sea Research, Inc. v. The Brother Jonathan, 1992 Dist. LEXIS 4575 (N.D. Cal. Mar. 4, 1992)

United States v. Steinmetz, 973 F.2d 212 (3rd Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992), *aff'g* 763 F. Supp. 1293 (D.N.J. 1992)

Zych v. Unidentified, Wrecked and Abandoned Vessel, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992)

Sub-Sal, Inc. v. The DeBraak, 1992 WL 39050 (D. Del. Feb. 4, 1992)

Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525 (7th Cir. 1991), *aff'g in part* 746 F. Supp. 1334 (N.D. Ill. 1990)

Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, 895 F.2d 116 (3rd Cir. 1990), *rev'g* 710 F. Supp. 1020 (D.N.J. 1989)

Marx v. Guam, 866 F.2d 294 (9th Cir. 1989)

Fitzgerald v. Unidentified, Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989)

Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988)

Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E. 2d 549 (Mass. 1988)

Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923 (E.D.N.C. 1987)

Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987)

Indian River Recovery Co. v. The China, 645 F. Supp. 141 (D. Del 1986)

Indian River Recovery Co. v. Faithful Stewart, 1986 WL 7513 (D. Del. June 11, 1986)

Pierce v. Bemis, [1986] 2 W.L.R. 501 (Q.B. 1985)

Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985), *aff'g* 568 F. Supp. 1562 (S.D. Fla. 1983)

Chance v. Certain Artifacts Found and Salvaged, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985)

Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983)

Subaqueous Exploration & Archaeology Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983), *aff'd mem.*, 765 F.2d 139 (4th Cir. 1985)

Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), *vacating in part* 518 F. Supp. 816 (W.D. Tex. 1981)

Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 556 F. Supp. 1319 (S.D. Fla. 1983)

Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), *rev'g in part* 621 F.2d 1340 (5th Cir. 1980), *on remand*, 689 F.2d 1254 (5th Cir. 1982)

Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982)

Metropolitan Dade County v. One (1) Bronze Cannon, 537 F. Supp. 923 (S.D. Fla. 1982)

Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981)

Hener v. United States, 525 F. Supp. 350 (S.D.N.Y. 1981)

Hatteras, Inc. v. U.S.S. Hatteras, 1984 A.M.C. 1897 (S.D. Tex. 1981), *aff'd mem.*, 698 F.2d 1215 (5th Cir.), *cert. denied*, 461 U.S. 960 (1983)

Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981)

Platoro Ltd. v. Unidentified Remains of a Vessel, 614 F.2d 1051 (5th Cir.), *cert. denied*, 449 U.S. 901 (1980)

Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor, 478 F. Supp. 973 (E.D. La. 1979)

Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978)

Platoro Ltd. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975), *rev'g* 371 F. Supp. 356 (S.D. Tex. 1973)

Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968)

Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960)

State ex rel. Ervin v. Massachusetts Co., 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957)

Howard v. Sharlin, 61 So. 2d 181 (Fla. 1952)

Steinbraker v. Crouse, 182 A. 448 (Md. 1936)

Thompson v. United States, 62 Ct. Cl. 516 (1926)

Cargo from the Wreck of Bark Edwards, 12 F. 508 (D. Fla. 1882)

Eads v. Brazelton, 22 Ark. 499 (1861)

Wyman v. Hurlburt, 12 Ohio St. 81 (1843)